A Matter of Principle

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On 9 June 2020, the European Commission announced that it is bringing an infringement procedure against Germany for breach of fundamental principles of EU law. The reason for this decision is a judgement of the German Federal Constitutional Court (FCC) of 5 May 2020, in which the German court, for the first time in its history, declared a ruling by the European Court of Justice (ECJ) *ultra vires* and therefore not legally binding on Germany. The judgement of the FCC was rendered in the context of the European Central Bank's (ECB) Public Sector Purchase Programme (PSPP). In essence, the German FCC had found that the ECB decision, by lacking a proper proportionality assessment, constituted an *ultra vires* act, and that the ECJ, by finding the very same decision to be within the remit of EU law, was acting equally *ultra vires*.

To the European legal order, this finding was quite a blow. It evoked many concerns not just in relation to the ECB's PSPP or the similarly structured Pandemic Emergency Purchasing Programme (PEPP). Karlsruhe, with its judgment, also openly called into question the very authority of the ECJ as the sole arbiter of the validity of EU acts and thus undermined the primacy of EU law and its uniform application in the member states. As Merijn Chamon and I have argued in May 2020, the Commission is right to initiate an infringement procedure against Germany.

Bringing an infringement procedure: yes or no?

As a matter of EU law, it would have been entirely possible for the Commission to do nothing in response to the German judgment. As a matter of fact, there might even be good reasons for the Commission to do nothing.

One obvious argument in favour of doing nothing is that on substantive grounds, i.e. where it concerned the implementation of the ECB's PSPP in Germany, the dispute was always likely to just fizzle out and indeed has now been resolved. This was confirmed by the FCC in its order of 29 April 2021. All that it took was for the German federal government and the German Bundestag – to whom the judgement was actually addressed – to find that the ECB, based on a number of documents made available by it, has conducted a satisfactory proportionality assessment and thereby fulfilled the Court's requirements. If there is hence no actual, practical problem to be solved anymore, why even bother to bring an infringement procedure?

In addition, it is also doubtful what would be gained with an infringement procedure in this case, except perhaps for perpetuating a constitutional conundrum with no winners on both sides. At the basis of the dispute lies, after all, not so much the question of whether or not the ECB has exceeded its mandate but a much more fundamental issue of conflicting claims of authority between Karlsruhe and Luxembourg. This is not really a question that can be solved through an infringement

procedure – or by the German government for that matter, to whom the infringement action is actually addressed. The government cannot rectify a judicial infringement of EU law or order independent courts to do so. Even if the case will end up in front of the ECJ and the ECJ will agree with the Commission, it seems rather unlikely that the German Federal Constitutional Court will be swayed in its stance by a ruling from Luxembourg declaring that Germany has breached its obligations under the Treaties.

But perhaps this is not what the infringement procedure is supposed to achieve in the first place. Both arguments against launching an infringement procedure in this case are valid. But so are the arguments speaking in favour of it.

As has been mentioned above, the FCC ruling evoked concerns not just in relation to its practical impact on the ECB's programmes, but also in relation to the very authority of EU law and the fear that other member states and their courts might use the judgment as an example to justify their own non-compliance with rulings from Luxembourg. While the German FCC was not the first highest national court to defy an ECJ ruling (see the Danish *Ajos* case), it is the one carrying by far the largest political weight in the EU. As such, there is the fear that letting the FCC get away with openly defying an ECJ ruling might inspire other national courts, in particular the captured ones in Poland and Hungary, to come to similar conclusions in the future. Any such development would endanger the very foundation of the EU legal order.

In a similar vein, it would have been difficult for the Commission to explain why it is not bringing an infringement procedure against Germany for such a blatant breach of EU Treaty obligations (at least when looking at it from an EU perspective) but is doing so against other member states. In particular, the governments in Hungary and Poland are always quick to accuse Brussels of double standards when it comes to enforcing EU (rule of) law on the national level. Right now, a case is pending in front of the Polish constitutional tribunal questioning the primacy of EU law over the Polish constitution. The Commission has sent a letter to the Polish government on the same day that it announced the infringement procedure against Germany, asking it to withdraw the application for constitutional review. Whether the alleged double standards by the Commission are thus real or imagined, one thing seems clear: Not going after Germany but sending a letter to Poland would have reinforced the impression that some member states in the EU are more equal than others. By launching an infringement procedure against Germany, the Commission is emphasizing the notion of equality between the member states and thus, at least in this regard, is taking the wind out of the sails of its critics.

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The infringement procedure is hence less about the possible outcomes and more a matter of principle to signal that the Commission, as the guardian of the Treaties, will not accept breaches of EU Treaty obligations, no matter the member state or authority in breach of EU law. Unfortunately, this is not something that the current Commission has been particularly good in thus far. Which is why it is all the more important that it is now, with the infringement procedure against Germany, sending a signal to all member states and their national courts that non-compliance with ECJ

judgments is not something it simply accepts – not even from the powerful German Federal Constitutional Court.

In a time in which respect for EU law cannot always be taken for granted anymore, it is a positive sign that the Commission is giving up its cautious approach, at least in this particular case.

This text was published in parallel as a policy position at the Jacques Delors Centre.
